IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 15, 2008

STATE OF TENNESSEE v. JACKIE CALDWELL

Appeal from the Criminal Court for Campbell County
No. 13045 E. Shane Sexton, Judge

No. E2008-00307-CCA-R3-CD - Filed October 6, 2009

Appellant, Jackie Caldwell,[1] was indicted by the Campbell County Grand Jury for aggravated rape, rape of a child, and attempted rape of a child. At the conclusion of a jury trial, Appellant was found guilty of aggravated rape, criminal responsibility for facilitation of rape of a child, and criminal responsibility for facilitation of criminal attempt to commit aggravated sexual battery. Prior to sentencing, Appellant waived her ex post facto protections in order to be sentenced under the amendments to Tennessee Code Annotated section 40-35-210 that went into effect on June 7, 2005. The trial court sentenced Appellant to twenty-two years for aggravated rape, eight years for criminal responsibility for facilitation of rape of a child, and four years for criminal responsibility for facilitation of criminal attempt to commit aggravated sexual battery. The trial court ordered the sentences to run concurrently, for a total effective sentence of twenty-two years. Appellant filed a timely notice of appeal and seeks resolution of the following issues on appeal: (1) whether the evidence was sufficient to support the convictions for aggravated rape and criminal responsibility for facilitation of rape of a child; (2) whether the evidence established Appellant's identity or presence beyond a reasonable doubt; and (3) whether the trial court erred by considering several enhancement factors and failing to consider a mitigating factor. We determine that the evidence is sufficient to support Appellant's conviction for aggravated rape. We further determine that Appellant's sentence of twenty-two years for aggravated rape should be affirmed. With regard to Appellant's remaining convictions, we determine that the evidence was legally and factually insufficient to sustain Appellant's convictions for criminal responsibility for facilitation of rape of a child and criminal responsibility for facilitation of criminal attempt to commit aggravated sexual battery under the theory of criminal responsibility as set forth in subdivision (3) of Tennessee Code Annotated section 39-11-401. Accordingly, Appellant's convictions for criminal responsibility for facilitation of rape of a child and criminal responsibility for facilitation of criminal attempt to commit aggravated sexual battery under the theory of criminal responsibility as set forth in subdivision (3) of Tennessee Code Annotated section 39-11-402 are reversed and dismissed. Accordingly, judgments of the trial court are affirmed in part, reversed and dismissed in part, and remanded for entry of judgment in accordance with this opinion.

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[1] At the time of the trial, Appellant was known as Jackie Martin. For the sake of clarity and consistency, we will refer to her by her name at the time of the indictment, Jackie Caldwell.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal is Affirmed in Part, Reversed and Dismissed in Part and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, and ROBERT W. WEDEMEYER, JJ, joined.

Charles Herman, District Public Defender, for the appellant, Jackie Caldwell.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; William Paul Phillips, District Attorney General, and Scarlette W. Ellis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the time of the incidents which gave rise to the indictments herein, Appellant was the girlfriend of Daniel Scott Adkins. At one point, Appellant lived in a house behind Mr. Adkins and his children on North 7th Street in LaFollete, Tennessee. Mr. Adkins lived in a blue house. Mr. Adkins and his children then moved to West Cherry Street in LaFollette, Tennessee. Appellant lived two doors down from Mr. Adkins and his children on West Cherry Street. Even though Appellant maintained a separate residence, she stayed at Mr. Adkins's house most of the time.

Mr. Adkins had several children, including the victim, H.A.[2] and her brother, S.A. H.A. was subjected to repeated sexual abuse by her father, Mr. Adkins. At times, Appellant joined Mr. Adkins in sexually abusing the victim. These incidents led to the issuance of a multi-count indictment by the Cambell County Grand Jury in June of 2006 for events that took place between April of 2001 and August of 2005, when the victim was between the ages of eleven and fifteen. In the multi-count indictment, Mr. Adkins was charged with one count of aggravated rape, two counts of rape of a child, and one count of attempted rape of a child. Appellant, on the other hand, was charged with one count of aggravated rape, one count of rape of a child, and one count of attempted rape of a child.

H.A. testified at trial as to the events which led to the indictments. At the time of the trial, she was seventeen years old and lived in Kentucky with a foster family.

Appellant lived near H.A. and her family, but "mostly" stayed with them at their house. During one incident at the house on West Cherry Street , Mr. Adkins told H.A. to get out of bed and come to his room. When H.A. got to her father's bedroom, he told her to take her pants off. H.A. refused to comply, so he "pulled" her pants off. Then Mr. Adkins told Appellant to "put her mouth" on H.A. At first, Appellant "just stared at [Mr. Adkins]" but then she "put her mouth" on H.A.'s

[2] It is the policy of this Court to refer to the minor victims of sexual crimes by their initials.

vagina. Appellant used her tongue and was "moving her tongue" on H.A's "private." H.A. did not recall if Appellant's tongue went inside her vagina. During the incident, Mr. Adkins was "using his hands" to touch H.A.'s privates and "slapped" H.A. because she was "fighting him back." Mr. Adkins inserted his finger into H.A.'s vagina. Appellant did nothing to prevent Mr. Adkins from touching H.A.

H.A.'s brother S.A. witnessed this event. He saw Appellant with "her head between [H.A.'s legs]. At the time, S.A. was sitting in the living room and could hear his sister screaming for "help" and for someone to "get off [of her]." S.A. saw that his sister had her pants and her panties off and that his father was "laying on the bed" next to H.A. S.A. was eleven or twelve years old at the time.

H.A. described another incident at the house on West Cherry Street that occurred in her own bedroom. During this incident, Mr. Adkins "told [Appellant] to - - it was whenever he had put a white cloth or something in [the victim's] mouth, and he told [Appellant] to hold [H.A.], and that's when [Appellant] told [H.A.] . . . that [Appellant] was gonna count to three, and [Appellant] told me to try to get away. . . ." H.A. could not get away because Mr. Adkins "kept pulling" her. Mr. Adkins had placed a cloth into H.A.'s mouth so that she would not wake up the other children. H.A. yelled during this incident, telling her father to "stop" and leave her alone. While Appellant was holding H.A. down, Mr. Adkins "put his private" in H.A.'s vagina.

H.A. remembered Mr. Adkins threatening Appellant on more than one occasion. Mr. Adkins would tell Appellant that "he would shoot her, but he didn't have a gun." The victim also recalled Mr. Adkins threatening Appellant with a knife and pushing Appellant.

H.A. described a third incident at the house on West Cherry Street where Mr. Adkins and Appellant told H.A. that "the doctor had supposedly said that if [H.A.] didn't start [her] period, [she would] have to have sex to start [her] period . . . ." H.A. did not believe her father but Appellant agreed with him. H.A. could not remember if anything "sexual" took place after that conversation.

Another incident occurred when H.A. was living with her father and Appellant in "the blue house." During this incident, Appellant "used her hand" to touch H.A.'s vagina. Appellant "used her finger," and Mr. Adkins was present. H.A. described another incident that took place outside the blue house. H.A. was wearing a skirt, and her father "put his hand" up her skirt and started touching her under her skirt. H.A. thought that Appellant was present during this incident. At the time that these incidents occurred, H.A. thought that she was "seven or eight" years old.

H.A. remembered one time during the years of abuse that Appellant told Mr. Adkins that what she was doing to H.A. was "not right."

After they lived in the house on West Cherry Street, H.A. and her family moved to Kentucky. Appellant and her children moved there with them. After H.A. had been in Kentucky for some time, she confided in a friend and told about her abuse. H.A.'s friend told her mother who, in turn,

informed the authorities. H.A. eventually told a social worker about the abuse in January of 2005. H.A.'s descriptions of the events led to the indictments at issue herein.

H.A.'s claims were investigated by Detective Jeff Allen of the LaFollette Police Department. As part of the investigation, Detective Allen interviewed Appellant on June 1, 2006. During the interview, Appellant admitted that she held H.A. down during an encounter at the house on West West Cherry Street and "performed oral sex" on the victim before her father raped her. Appellant also informed Detective Allen that he witnessed Mr. Adkins fondle H.A. under her skirt one time and fondle the victim one time while she was lying on a couch. Appellant stated that "she reported one incident to Ms. Burress with REACHS."[3] According to Appellant, Mr. Adkins "held a gun to her head and made her perform oral sex on [H.A.]"

According to the records of LaFollette Utilities, Mr. Adkins had utility services at 400 North 7th Street from September 1, 1998, to March 13, 2002. The records of the utility company showed services in the name of Mr. Adkins at 307 West Cherry Street from December 2, 2003, to February 17, 2004. Appellant, on the other hand, had utility service at 313 West Cherry Street from October 24, 2003, to February 4, 2004.

Appellant's sister-in-law, Patricia Ann Martin Smith, testified at trial. According to Ms. Smith, Appellant told her about having "oral sex" with H.A. to "get her wet" so Mr. Adkins could "insert his penis." Ms. Smith also heard Appellant talk about using her fingers on H.A. Appellant said that her actions "couldn't be proved." Appellant told Ms. Smith that she was molested as a child.

Appellant called her husband, Harley Martin, to testify at trial. He claimed that he had never heard Appellant talk about any incidents that occurred with H.A. Mr. Martin also claimed that his sister, Mrs. Smith, was not always a truthful person.

At the conclusion of the jury trial, Appellant was found guilty of aggravated rape, criminal responsibility for facilitation of rape of a child, and criminal responsibility for facilitation of criminal attempt to commit aggravated sexual battery. At a sentencing hearing, the trial court sentenced Appellant to serve twenty-two years for aggravated rape, eight years for criminal responsibility for facilitation of rape of a child, and four years for criminal responsibility for facilitation of criminal attempt to commit aggravated sexual battery. The trial court ordered the sentences to be served concurrently, for a total effective sentence of twenty-two years.

Appellant's motion for new trial was denied by the trial court. On appeal, she challenges the sufficiency of the evidence and her sentence.

[3] There is no explanation of the acronym REACHS in the record.

Analysis
Sufficiency of the Evidence

On appeal Appellant challenges the sufficiency of the evidence for her convictions. When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the "State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

Aggravated Rape

Appellant was convicted of aggravated rape for an incident that occurred in H.A.'s bedroom where Appellant held the victim down while Mr. Adkins raped the victim. Appellant contends that the State relied on a theory of criminal responsibility wherein Appellant had a "duty imposed by law" to prevent the commission of the offense as required by Tennessee Code Annotated section 39-11-402(3), defining criminal responsibility. Appellant points to closing argument of the State's attorney wherein counsel stated, "[W]hile she was holding [H.A.] down, she didn't do anything about that. She did not help. She participated. She knew what she was doing. She knowingly did it." On appeal, Appellant argues that the evidence was insufficient to convict her of aggravated rape "under the theory of being criminally responsible for the conduct of Daniel Scott Adkins" because "no reasonable juror could have found beyond a reasonable doubt that she [had] a 'duty imposed by law' or [had] 'voluntarily undertaken' to prevent the commission of the offense as required by T.C.A. 39-11-402(3)," as argued by the prosecutor in closing arguments. Further, Appellant argues that she did not voluntarily assist Mr. Adkins in the commission of the offense but instead was forced to participate in the crime when Mr. Adkins threatened her with violence. The State, on the other hand, argues that the proof establishes that Appellant was guilty of aggravated rape because she aided and abetted Mr. Adkins in the commission of the offense by holding H.A. down during the rape.

Aggravated rape is defined, as it pertains to this case as the:

> [U]nlawful sexual penetration of a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:
>
> . . . .
>
> (3) The defendant is aided or abetted by one (1) or more other persons; and
>
> (A) Force or coercion is used to accomplish the act; . . . .

T.C.A. § 39-13-502(a). "A person is criminally responsible as a party to an offense, if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both." T.C.A. § 39-11-401(a). A person is criminally responsible for the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense" or "[h]aving a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense." *Id.* § 39-11-402(2), (3). "Criminal responsibility is not a separate crime but [instead] a theory by which the State may prove the defendant's guilt [ ] . . ., based upon the conduct of another person." *State v. Mickens*, 123 S.W.3d 355, 389-90 (Tenn. Crim. App. 2003).

This Court examined a similar factual scenario in *State v. Woody J. Dozier*, No. 02C01-9610-CC-00357, 1997 WL 684944 (Tenn. Crim. App., at Jackson, Nov. 4, 1997), *perm. app. denied*, (Tenn. Sept. 14, 1998). In *Woody J. Dozier*, the State sought to enhance defendant's conviction for rape to aggravated rape on the basis that he was aided and abetted by his co-defendant. 1997 WL 684944, at *1. The facts showed that the co-defendant was present and in a position to aid and assist the defendant at all times during the commission of the rape. *Id.* at *12. Specifically, the facts elicited at trial indicated that after the victim entered the defendant's vehicle, the co-defendant questioned the victim about the kind of sex she had with her boyfriend. The victim testified that she also overheard the two defendants discussing her fate. *Id.* This Court explained:

> More than mere presence at the crime scene and an acquaintanceship with the perpetrator is necessary to support a finding that a person is an aider and abettor. *Essary v. State*, 210 Tenn. 220, 357 S.W.2d 342 (Tenn. 1962); *see also People v. Rockwell*, 188 Mich. App. 405, 470 N.W.2d 673 (Mich. App. 1991); *State v. Brumley*, No. 89-P-2092 (Ohio App. 11 dist. Mar. 29, 1996). Moreover, mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. But, presence alone is enough if presence is intended to assist the perpetrator in the commission of the offense. *See* 1 F. Wharton, *Criminal Law* § 114 at 60 (1978).

> For [co-defendant] to aid or abet [defendant], it was unnecessary that he share the criminal intent of the perpetrator to commit the rape. However, he must have knowingly intended to assist, encourage, or facilitate the design of the criminal actor. Thus, there must be some evidence tending to show that the alleged aider and abettor, by word or deed, gave active encouragement to the perpetrator of the rape or, by his conduct, made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary. *See Flippen v. State*, 211 Tenn. 507, 365 S.W.2d 895 (Tenn. 1963); *see also State v. Penland*, 343 N.C. 634, 472 S.E.2d 734, 743 (N.C. 1996), *cert. denied*, . . . , 117 S.Ct. 781 (1997). The aider must, therefore, in some way "associate himself with the venture, participate in it as in something that he wishes to bring about, and seek by his actions to make it succeed." *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938), *quoted with approval in*, *Nye & Nissan v. United States*, 336 U.S. 613, 619, 69 S.Ct. 766, 770, 93 L.Ed. 919 (1949). Thus, although his intent to assist the perpetrator may be proven by circumstantial evidence and need not be demonstrated by express actions, the evidence must support the conclusion that the aider's presence lent support and encouragement to his companion(s).
>
> Whether or not a person present at the scene of the crime aided and abetted the perpetrator of the offense is a question of fact to be determined by the jury. The answer of which depends on circumstances surrounding his presence and his conduct before, during, and after the commission of the rape.

Id. at *12. In *Woody J. Dozier*, this Court concluded that the co-defendant's actions of inquiring about the victim's sexual preferences before the rape, his presence at the crime scene, and his threat of harm afterward encouraged the commission of the offense. Further, this Court determined that the co-defendant's "presence created, in the mind of the victim, an atmosphere of intimidation and a greater threat of harm." *Id.* In other words, the proof showed that the defendant was guilty of aggravated rape when he was aided and abetted by the co-defendant and used force or coercion on the victim. *Id. See also State v. Cecil Eugene McGuire*, No. 03C01-9705-CC-00191, 1998 WL 681280, at *6 (Tenn. Crim. App., at Knoxville, Oct. 2, 1998) (finding defendant guilty of aggravated sexual battery where the evidence in the record demonstrated that the co-defendant "advised, counseled, and even urged the defendant to commit sexual battery and that his presence lent encouragement and support").

In the case herein, during closing arguments, counsel for the State argued that Appellant "had responsibility as the girlfriend in that house to - - for what was happening with [H.A.], and she chose to do nothing about that." The trial judge instructed the jury on the elements of aggravated rape, and

found the evidence to warrant a further instruction on criminal responsibility for another.[4] The trial court charged the jury as follows:

> The defendant is criminally responsible as a party to the offense of all offenses in this indictment if the offenses were committed by the defendant's own conduct, by the conduct of another for which the defendant is criminally responsible, or by both. Each party to the offense may be charged with the commission of the offense.
>
> The defendant is criminally responsible for an offense committed by the conduct of another if, acting with the culpability required for the offense, the defendant causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense.
>
> The defendant is criminally responsible for an offense committed by the conduct of another if, acting with the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the defendant solicits, directs, aids or attempts to aid another person to commit the offense.
>
> The defendant is criminally responsible for an offense committed by the conduct of another if, having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or result of the offense, or to promote or assist this commission, the defendant fails to make a reasonable effort to prevent commission of the offense.
>
> In deciding the criminal responsibility of the defendant, the Jury may also take into consideration any evidence offered that the defendant attempted to thwart or withdraw from any of the offenses that followed from the original offense.
>
> Before you find the defendant guilty of being criminally responsible for a set of offenses committed by the conduct of another, you must find that all the essential elements of said offenses have been proven by the State beyond a reasonable doubt.

The trial court instructed the jury with the entire definition of criminal responsibility, explaining all portions of Tennessee Code Annotation section 39-11-402, not merely the section complained about by Appellant on appeal which indicates a duty imposed by law or voluntarily undertaken to prevent commission of the offense accompanied with the failure to prevent commission of the offense. T.C.A. § 39-11-402(2) &(3). The jury verdict finding Appellant guilty of aggravated rape indicated that they found Appellant guilty of aggravated rape, not that they found Appellant guilty of

[4] We find it important to note that the indictment for aggravated rape does not allege Appellant's guilt arose via a theory of criminal responsibility pursuant to Tennessee Code Annotated section § 39-11-402(3) in light of our decision with regard to Appellant's remaining convictions.

aggravated rape under a theory of criminal responsibility where Appellant had a duty to prevent Mr. Adkins's actions and somehow failed to do so.

The proof supports the jury's verdict. The proof at trial showed that when the victim was fourteen years old she lived at 307 West Cherry Street in LaFollette with her father and siblings. Appellant often stayed with them and was her father's girlfriend. During one incident at the house, Mr. Adkins raped H.S. while Appellant held H.A.'s arms, preventing her from getting up. Mr. Adkins had placed a cloth in her mouth so that the other children would not hear her screams. Appellant told H.A. to try to get away but continued to hold H.A. down while Mr. Adkins raped her. H.A. testified that Mr. Adkins told Appellant to hold her down and she complied. Appellant admitted to the police that she held H.A. down during the rape. The jury could have rationally determined that Appellant aided and abetted Mr. Adkins in the commission of the rape by holding H.A. down so that Mr. Adkins could penetrate the victim. Appellant is not entitled to relief on this issue. "An indictment that charges an accused on the principal offense 'carries with it all the nuances of the offense,' including criminal responsibility." *State v. Lemacks*, 996 S.W.2d 166, 173 (Tenn. 1999) (quoting *State v. Lequire*, 634 S.W.2d 608, 615 (Tenn. Crim. App. 1981)).

In a related argument, Appellant also seems to complain that the trial court "should have given an instruction on duress or undue influence" because the "testimony of H.A. was uncontradicted as to the force, influence and threats made by [Mr. Adkins] toward [Appellant] during or at the time of this incident."

It is well-established that a trial court has a duty to give a complete charge of the law applicable to the facts of the case. *State v. Harris*, 839 S.W.2d 54, 73 (Tenn. 1992). Anything short of a complete charge denies a defendant his constitutional right to trial by a jury. *State v. McAfee*, 737 S.W.2d 304, 308 (Tenn. Crim. App. 1987). However, Tennessee law does not mandate that any particular jury instructions be given so long as the trial court gives a complete charge on the applicable law. *State v. West*, 844 S.W.2d 144, 151 (Tenn. 1992). A charge is prejudicial error "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997).

Tennessee Code Annotated section 39-11-504(a) states:

> Duress is a defense to prosecution where the person or a third person is threatened with harm that is present, imminent, impending and of such a nature to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. The threatened harm must be continuous throughout the time the act is being committed, and must be one from which the person cannot withdraw in safety. Further, the desirability and urgency of avoiding the harm must clearly outweigh the harm sought to be prevented by the law proscribing the conduct, according to ordinary standards of reasonableness.

The standard to allow inclusion of a statutory defense in the jury instructions is found in both case law and the statutes. The test to determine whether a trial court should have given a special instruction is whether "there is any evidence which reasonable minds could accept" to support such an instruction. *Johnson v. State*, 531 S.W.2d 558, 559 (Tenn. 1975). Under Tennessee Code Annotated section 39-11-203(c), the existence of the defense must be fairly raised by the proof if the defense is to be submitted to the jury. For a statutory defense to be fairly raised by the proof "a court must, in effect, consider the evidence in the light most favorable to the defendant, including drawing all reasonable inferences flowing from that evidence," because the trial courts and appellate courts must avoid judging the credibility of the witnesses when making this determination. *State v. Shropshire*, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1993). In order for the existence of the defense of duress to be fairly raised by the proof herein, "There must be no reasonable means to escape the compulsion to commit the offense." *State v. Davenport*, 973 S.W.2d 283, 288 (Tenn. Crim. App. 1998).

The Tennessee Rules of Appellate Procedure provide that:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived.

Tenn. R. App. P. 3(e). Appellant did not seek any special requests at trial. Further, Appellant's failure to address the failure of the trial court to give an instruction on duress in her motion for new trial results in the waiver of this issue on appeal. *See* Tenn. R. App. P. 3(e) and 36(a).

Thus, the only way this Court can review the issue is via plain error, as set forth in Tennessee Rule of Criminal Procedure 52.[5] In order to seek review via a plain error analysis, the following five factors must be established:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused [must not have waived] the issue for tactical reasons; and (e) consideration of the error [must be] "necessary to do substantial justice."

State v. Terry, 118 S.W.3d 355, 360 (Tenn. 2003) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted)). Appellant has failed to establish all five

[5] Effective July 1, 2009, Tennessee Rule of Criminal Procedure Rule 52 is deleted in its entirety, and the plain error language is added to Rule 36(b) of the Tennessee Rules of Appellate Procedure.

factors necessary for plain error review. We determine that consideration of the issue is not necessary to do substantial justice. While the testimony at trial indicated that Mr. Adkins threatened Appellant during the incident by telling her "he would shoot her," the victim testified that Mr. Adkins "didn't have a gun." The testimony of H.A. also indicated that Mr. Adkins had also threatened Appellant with a "knife" but H.A. could not remember if this occurred during the incident utilized by the State to establish the elements of aggravated rape. The proof, therefore, does not establish duress in that Appellant was not subjected to a "continuous [threat] throughout the time the act [wa]s being committed, and [was] one from which [Appellant could not] withdraw in safety." *Green*, 915 S.W.2d at 832. Therefore, we will not review the failure of the trial court to instruct the jury with duress as plain error. This issue has no merit.

Criminal Responsibility for Facilitation of Rape of a Child

Appellant claims that the evidence is insufficient to sustain her conviction for criminal responsibility for facilitation of rape of a child for the incident that occurred in Mr. Adkins's bedroom at the blue house. Specifically, Appellant argues that the testimony at trial did not prove that Mr. Adkins committed rape of a child, so "there is no way the defendant could be found to have provided substantial assistance by the jury." Appellant also argues that she had no duty either imposed by law or voluntarily undertaken to prevent the commission of the offenses. The State disagrees, asserting that the evidence was sufficient to support the charge of rape of a child and, thus, supports Appellant's conviction on the lesser included offense of criminal responsibility for facilitation of rape of a child.

Further, Appellant challenges her conviction for criminal responsibility for facilitation of criminal attempt to commit aggravated sexual battery. With regard to this conviction, Appellant argues that the proof did not even establish that she was present during the commission of the crime or that she "had any intent to promote or assist in the commission of the act of [Mr. Adkins]." Appellant claims that she was not under a duty imposed by law to prevent the commission of the offense, as alleged in the indictment charging appellant with attempted rape of a child. The State argues that the evidence is sufficient to support the conviction for criminal responsibility for facilitation of criminal attempt to commit aggravated sexual battery. The State fails to address whether Appellant was under a duty imposed by law or voluntarily undertaken as alleged in the indictments. In other words, Appellant advances the same argument with respect to this conviction as she did for her conviction for criminal responsibility for facilitation of rape of a child, that there was no proof presented at trial establishing that she had a duty imposed by law or had voluntarily undertaken a duty to prevent the commission of the offenses as required by subdivision (3) of Tennessee Code Annotated section 39-11-402.

As stated previously, a person is criminally responsible for the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense" or "[h]aving a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote

or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense." *Id.* § 39-11-402(2), (3). Again, criminal responsibility is a theory by which the State may prove the defendant's guilt based upon another person's conduct. *Mickens*, 123 S.W.3dat 389-90.

We begin our review of this conviction by examining the indictment charging Appellant with rape of a child. The indictment alleged in Count 4 that Appellant:

> [K]nowingly sexually penetrate[d] [H.A.], a person less than thirteen (13) years of age, in that [Appellant] acting with intent to promote or assist in the offense aided [Mr. Adkins] in the commission of the offense when the said [Appellant] had a duty to prevent the commission of the offense, in violation of T.C.A. § 39-13-522 and T.C.A. § 39-11-402, all of which is against the peace and dignity of the State of Tennessee.

Additionally, the indictment in Count 6 alleged that Appellant:

> [K]nowingly attempt[ed] to sexually penetrate [H.A.], a person less than thirteen (13) years of age, in that [Appellant] acting with intent to promote or assist in the offense aided David Adkins in the commission of the offense when the said [Appellant] had a duty to prevent the commission of the offense . . . .

In other words, the State made it a point to specifically charge Appellant under subdivision (3) of the criminal responsibility statute in each indictment, which ascribes a legal duty to make a reasonable effort to prevent the commission of a crime or insinuates that a duty was "voluntarily undertaken" by the defendant to prevent the commission of a crime. For some reason, however, the trial court charged the jury with all three "theories" of criminal responsibility, as previously noted. Perhaps the trial court charged the jury with all three theories in light of the fact that the State sought to convict Appellant for aggravated rape on the basis of a theory of criminal responsibility not exclusively limited to Tennessee Code Annotated section 39-11-402(3). The jury charge did not define "legal duty" for the jury, or instruct the jury on when such a duty attaches. That said, we now address whether the evidence was legally and factually sufficient to prove that Appellant, having a duty imposed by law or voluntarily undertaken to prevent commission of the offenses and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, failed to make a reasonable effort to prevent commission of the offenses. *See* T.C.A. § 39-11-402(3).

Appellant was indicted in Count 4 for rape of a child that occurred in Mr. Adkins's bedroom at the blue house. In order to convict Appellant of rape of a child, the State had to prove beyond a reasonable doubt that Appellant engaged in unlawful sexual penetration with H.A. and that H.A. was less than thirteen years of age at the time of the penetration. *See* T.C.A. § 39-13-522. "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required."

Id. 39-13-501(7). At the conclusion of the trial, the jury convicted Appellant of criminal responsibility for facilitation of rape of a child. Appellant was indicted in Count 6 for attempted rape of a child that occurred when Mr. Adkins placed his hand up H.A.'s skirt and started touching her while Appellant was present. In order to convict Appellant of attempted rape of a child, the State had to show that Appellant, "acting with the kind of culpability otherwise required for the offense" did one of the following:

> (1) Intentionally engage[d] in action or cause[d] a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;
> (2) Act[ed] with intent to cause a result that is an element of the offense, and believe[d] the conduct will cause the result without further conduct on the person's part; or
> (3) Act[ed] with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believe[d] them to be, and the conduct constitutes a substantial step toward the commission of the offense.

T.C.A. § 39-12-101(a).

The facts relied upon by the State to establish the crime of rape of a child at trial came from the testimony of H.A. During her testimony, H.A. described one episode that occurred while she was living at the blue house when she was in her father's bedroom with Appellant and her father. During this incident, H.A. testified that Appellant "used her finger" while her father was present. At the time, H.A. was seven or eight years old. The facts used to establish the attempted rape came from the testimony of H.A. and the admissions of Appellant. H.A. remembered her father placing his hand up her skirt. She could not remember if Appellant was present. Appellant, however, admitted to Detective Allen that she saw Mr. Adkins trying to fondle the victim under her skirt and did nothing to prevent it. With regard to all of the incidents, the victim testified that she "trusted" Appellant and "thought that she could protect" her because she was part of her life. The testimony also indicated that Appellant lived with H.A. and her siblings.

This Court has previously addressed a remarkably similar situation where the issue was whether the evidence was legally and factually sufficient to prove that Appellant, having a duty imposed by law or voluntarily undertaken to prevent commission of the offenses and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, failed to make a reasonable effort to prevent commission of the offenses. *State v. Larry E. Rathbone*, No. E2007-00602-CCA-R3-CD, 2008 WL 1744581 (Tenn. Crim. App., at Knoxville, Apr. 16, 2008), *perm. app. denied* (Tenn. Oct. 27, 2008). In *Larry E. Rathbone*, Defendant Fleeman was convicted of two counts of child rape, two counts of aggravated sexual battery, and one count of attempted child rape. 2008 WL 1744581, at *1. Defendant Fleeman was the girlfriend of the father/co-defendant of the victim. The victim spent the weekends at their home. The indictments alleged that Defendant Fleeman was guilty of the indicted offenses via a theory of criminal

responsibility based on the application of section (3) of Tennessee Code Annotated section 39-11-402(3). *Larry E. Rathbone*, 2008 WL 1744581, at *7. In examining whether a duty existed in the factual scenario in *Larry E. Rathbone*, this Court commented:

> According to the comments to Tennessee Code Annotated section 39-11-402, subdivision (3) places criminal liability in the situation where a person who has a legal duty to prevent the crime fails to do so with the specific intent to further the crime. While not expressly stated, it appears that subdivision (3) relates to situations where a person may be criminally responsible for the conduct of another by failing to act. In this regard, we note that "for criminal liability to attach, it must be found that there was a legal duty to act and not simply a moral duty." *State v. Jeffrey Lloyd Winders*, No. 88-142-III, 1989 WL 105710, at *2-3 (Tenn. Crim. App. Nashville, Sept. 14, 1989) (citing LaFave & Scott, Criminal Law § 3.3(a) (2d ed.1986)).
>
> Although there is no Tennessee case law directly on point, the following response by this court is instructive:
>
> > We do not believe the legislature intended to require every citizen to exercise an affirmative duty "imposed by law" to prevent the commission of a crime. Rather, this section refers to members of law enforcement agencies and others (such as care givers or custodial parents) vested with a specific duty to prevent a crime from occurring. Also, this section refers to those who have voluntarily undertaken to prevent commission of the offense." Tenn. Code Ann. 39-11-402(3).

See State v. Michael Tyrone Gordon, No. 01C01-9605-CR-00213, 1997 WL 578961, at *6 (Tenn. Crim. App., Nashville, Sept. 18, 1997) (upholding defendant's conviction for child neglect under theory of criminal responsibility) (Judge Reid dissenting). Also instructive is this court's discussion in *State v. Hodges*, 7 S.W.3d 609 (Tenn. Crim. App. 1998). In *Hodges*, the defendant was convicted of criminal responsibility for the first degree felony murder and the aggravated child abuse of his two-year-old step child. *Id.* at 613. The proof showed that the defendant was married to the child's mother and they lived together. *Id.* at 616. The defendant cared for the child alone between the hours of approximately 6:30 a.m. and 5:00 p.m while the mother of the child worked. *Id.* at 621. From this evidence, a panel of this court stated the following:

> [A]s [the child's] step-parent and caretaker, [the defendant] bore a duty to protect [the child] from harm and provide her with emergency attention. [The defendant], although not the [child's] legal guardian, was entrusted by her legal guardian to watch over her on a daily basis.

> We consider this to be a "duty imposed by law" within the meaning of § 39-11-402(3).

Id. at 623. Accordingly, it appears that the special relationship of parent and child or caretaker and child creates a legal duty to protect the child from harm, such that the parent or caretaker who breaches that duty is subject to criminal liability as set forth in section 39-11-402(3). [FN2]

> [FN2] After a thorough and painstaking search of case law in Tennessee, we have not located any authority extending the legal duty to a child beyond the special relationships identified. We refrain from doing so today as it is not our role to sit as judicial legislators and create new duties and liabilities which theretofore did not exist. We note that the dissent in *State v. Miranda* offers particular insight regarding the problems associated with (1) the application of affirmative duties set forth in the common law to a criminal responsibility statute; and (2) the imposition of criminal liability based upon a failure to act when one has a legal duty to do so. 245 Conn. 209, 715 A.2d 680, 694-701 (Conn.1998) (Justice Berdon dissenting) overruled by *State v. Miranda*, 274 Conn. 727, 878 A.2d 1118 (Conn. 2005). We also find Paul Robinson's article entitled "Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States," instructive as to why the imposition of affirmative legal obligations on persons to protect children from abuse is best left to the legislature. The article notes that "[t]here is a general, albeit declining, reluctance in the United States to impose affirmative duties and to punish nonperformance of those duties. Various explanations for the reluctance to criminalize inactivity have been offered. First, there is difficulty in defining with sufficient clarity the effort that must be expended in order to satisfy the duty. Second, the inherent ambiguity in defining the scope of a duty leads to speculation about guilt and thereby poses a threat to society more serious than the harm prevented by requiring affirmative conduct. Third, because 'prevailing attitudes draw sharp distinctions between overt action and passivity[, the] legislature cannot ignore the mores, nor should it implement them beyond necessary limits.' Finally, a governmental demand to perform is significantly more intrusive than a command to refrain from harmful action and therefore must be justified by a significant overriding public interest and must be imposed in a way that minimizes the extent of intrusion." 29 N.Y.L. Sch. L.Rev. 101, 104 (1984).

Larry E. Rathbone, 2008 WL 1744581, at *8-9. The Court went on to determine that the evidence was insufficient to establish that Defendant Fleeman had a legal duty to protect the victim from the harm caused by her own father, "such that the breach of the duty by her failure to prevent the abuse exposed her to criminal liability under section 39-11-402(3)." *Id.* at *9. The Court looked to the fact that the defendant was not the biological parent of the child and that the record was devoid of evidence that the defendant voluntarily assumed the role of "responsibility for the care and welfare" of the victim. *Id.* Interestingly, the Court pointed out how it was "difficult to reconcile how Defendant Fleeman can be found criminally liable for the offenses of child rape, attempted child rape, and aggravated sexual battery as a result of her failure to act when each of these offenses requires proof of an overt criminal act." *Id.* at *9 n.3. The Court found it unnecessary to address this "legal quagmire" however because it determined ultimately that "the evidence was insufficient to show that Defendant Fleeman had a legal duty to prevent the commission of the offenses." *Id.*

Additionally, we find it appropriate to note that the Court in *Larry E. Rathbone* pointed out the following:

> We would further note that there is only a scintilla of evidence from which the jury could draw the inference that Defendant Fleeman was acting with the specific intent to promote or assist in the sexual abuse of C.R. perpetrated by Defendant Rathbone. More than Defendant Fleeman's presence must be shown to hold her criminally responsible for the sexual offenses committed by Defendant Rathbone. The evidence must establish beyond a reasonable doubt that she, having knowledge of the criminal intent entertained by Defendant Rathbone, participated in the perpetration of the offenses to the extent that her participation demonstrates the intent on her part to associate with the commission of the offense. *See State v. Gray*, 628 S.W.2d 746, 748 (Tenn. Crim. App. 1981) ("Knowledge of and intent to aid and abet in the crime being committed is essential to show a person is an aider and abettor."). In other words, subdivision (3) of the criminal responsibility statute not only requires a legal duty, but also requires that the individual act with a culpable mental state, specifically, the intent to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense. "A person acts with intent as to the nature or result of conduct when it is that person's conscious objective or desire to engage in the conduct or cause the result." *Carson*, 950 S.W.2d at 954 (quoting Tenn. Code Ann. § 39-11-302(a)(1991)). It is the shared intent formed between two or more people which renders one of them criminally responsible for a criminal offense committed by the other.

Id. at *10. Ultimately, the Court in *Larry E. Rathbone* determined that the evidence was insufficient to establish that Defendant Fleeman had a legal duty to prevent the commission of the offenses. This Court reversed Defendant Fleeman's convictions for child rape, attempted child rape, and aggravated sexual battery arising from the theory of criminal responsibility. *Id.*

The analysis in *Rathbone* is applicable to the factual scenario presented herein. Recognizing the heinous nature of the atrocities H.A. was forced to endure during childhood, we are constrained to determine that the evidence presented at trial was legally and factually insufficient to sustain Appellant's convictions under the theory of criminal responsibility as set forth in subdivision (3) of Tennessee Code Annotated section 39-11-401. The evidence did not show that Appellant had a legal duty to prevent the commission of the offenses. Further, the evidence was insufficient to establish that Appellant voluntarily undertook a duty to somehow prevent the commission of the offenses. The testimony at trial, as elicited by the State from the victim, established that Appellant was the live-in girlfriend of her father. There was no testimony that Appellant was responsible for the care and nurturing of the victim or that she was entrusted with the role of mother or caregiver. Accordingly, we reverse and vacate Appellant's convictions for criminal responsibility for facilitation of rape of a child and criminal responsibility for facilitation of criminal attempt to commit aggravated sexual battery.[6] As noted previously, we affirm Appellant's conviction for aggravated rape.

Sentencing

Lastly, Appellant complains that the trial court enhanced the sentences "beyond the minimum sentence based on its finding and use of . . . enhancement factors" in violation of *Blakely v. Washington*, 542 U.S. 296 (2004). Appellant also argues that the trial court erred by failing to apply a mitigating factor. The State argues that the record supports Appellant's sentences.

As noted previously, Appellant filed a waiver of her ex post facto provisions prior to trial in order to be sentenced under the amendments to Tennessee Code Annotated section 40-35-210 that went into effect on June 7, 2005. The 2005 amendments to the sentencing act made the application of the enhancement factors advisory in nature. *See* T.C.A. § 40-35-114; *State v. Jackie Lynn Gray*, No. M2007-02360-CCA-R3-CD, 2008 WL 2579175, at *5 (Tenn. Crim. App., at Nashville, June 28, 2008), *perm. app. denied*, (Tenn. Dec. 29, 2008); *State v. Troy Sollis*, No. W2007-00688-CCA-R3-CD, 2008 WL 1931688, at *3 (Tenn. Crim. App., at Jackson, May, 2, 2008). Appellant does not argue that there was no evidence to support the application of the enhancement factors, she merely argues that the jury should have made the findings with regard to the existence of the factors. The trial court considered the nature and characteristics of the criminal conduct involved, Appellant's history and background, the mitigating and enhancement factors, and the principles of sentencing. *See State v. Carter*, 254 S.W.3d 335, 345-46 (Tenn. 2008). The trial court's imposition of a twenty-two year sentence for the Class A felony of aggravated rape is affirmed. This issue is without merit.

[6] Because of our conclusion with regard to the disposition of Appellant's convictions for criminal responsibility for facilitation of rape of a child and criminal responsibility for facilitation of criminal attempt to commit aggravated sexual battery, we deem it unnecessary at this juncture to address whether a defendant could even be found guilty of facilitating their own actions or whether a defendant can be found guilty of being criminally responsible for the facilitation of an attempt to commit a crime.

Conclusion

For the foregoing reasons, Appellant's convictions for criminal responsibility for rape of a child and criminal responsibility for facilitation of criminal attempt to commit aggravated sexual battery are reversed and dismissed. Appellant's conviction and sentence for aggravated rape are affirmed. Appellant will still be subject to an effective twenty-two year sentence. The matter is remanded to the trial court for entry of judgment consistent with this opinion.

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JERRY L. SMITH, JUDGE